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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1937.

No. [redacted] 301

GUARANTY TRUST COMPANY OF NEW YORK,
Executor, Estate of Lamar L. Fleming, Deceased,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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GUARANTY TRUST COMPANY OF NEW YORK, Executor, Estate of Lamar L. Fleming, Deceased,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

Petition.

The Petitioner, Guaranty Trust Company of New York, Executor, by its undersigned attorney, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review the judgment of that Court entered in the above cause on May 10, 1937. This suit originated in the Board of Tax Appeals on an appeal from a deficiency notice imposing additional income taxes of $39,874.31 for the period from January 1, 1933, to the date of the decedent's death on December 16, 1933. The case was tried on stipulated facts and exhibits. On June 4, 1936, the Board entered its judgment resolving all issues in favor of the petitioner, and, since part of the asserted deficiency had been paid, it determined that there was an over-payment of

$37,888.89 in the decedent's income taxes for the prior-to-death period. The Commissioner sought a review by the Circuit Court of Appeals for the Second Circuit of one issue involved, namely, whether the decedent's share of the earnings of a partnership of which he was a member, for the period from August 1 to December 16, 1933, but not distributed to him or his executors during that period, should be included in the decedent's income for the prior-to-death period, although there had already been included in such income the decedent's share of a full 12-months earnings of the partnership for its fiscal year ended July 31, 1933. The Circuit Court reversed the Board upon this issue. A certified copy of the transcript of record in the case, including the proceedings in the Circuit Court of Appeals, has been filed herewith in accordance with Rule 38 of this Court.

Statement of the Case.

Petitioner's testator, Lamar L. Fleming, died December 16, 1933. Prior to his death, he was a member of the partnership of Anderson, Clayton & Fleming, cotton brokers, of New York (R. 64).

The decedent kept his accounts on the cash receipts and disbursements basis. He made his tax returns on a *calendar* year basis. The accounts of the partnership were likewise kept on a cash basis. The business was operated and the partnership's tax returns were filed, however, on the basis of a *fiscal* year ending July 31 of each year (R. 64).

The partnership had operated under successive partnership agreements since 1918 (R. 19). The partnership agreements provided for a fiscal year ending July 31 of each year (Ex. A; R. 30), and when a new partner was admitted on July 31, 1933, the new agreement (Ex. B; R. 38) established an accounting period of the partnership upon the basis of a fiscal year ended July 31 of each year. The fiscal year of the partnership beginning August 1, 1933, was to continue until July 31, 1934, and the net profits for each fiscal year were

to be ascertained and distributed among the partners within a reasonable period after the close of such fiscal year (Ex. B; R. 38, 41).

Pursuant to the partnership articles a "general account" was taken at the end of the fiscal year, July 31, 1933; the decedent was notified of his share of the partnership earnings and the entire amount of such earnings for the full 12-month period was included in the income tax return filed on his behalf for the portion of the calendar year 1933 while he was alive (R. 65, 66). No part of the partnership earnings between the end of its fiscal year on July 31, 1933, and the decedent's death on December 16, 1933, was paid to or received by the decedent (R., 64). No part of such earnings was available to the partners prior to that time, since the partnership agreement provided for only one annual accounting and distribution of profits, and that upon the termination of the partnership's fiscal year (Ex. B; R. 41).

Following the decedent's death the business of the partnership was continued under the same name by the surviving partners (R. 65). Early in May, 1934, the surviving partners executed a new partnership agreement (Ex. C; R. 46-54), taking over the business as of December 18, 1933, and providing for a fiscal year ending July 31, 1934, and each year thereafter (Ex. C; R. 47).

After the death of the decedent, an account was taken covering the period from August 1 to December 16, 1933. Not until January 9, 1934, did the decedent's executors receive any part of the decedent's share of the partnership earnings for the period July 31 to December 16, 1933 and it was not until February, 1934, that the decedent's executors received the final distribution (R. 65). The decedent's share of the partnership earnings for the period August 1 to December 16, 1933, ~~were~~ WAS included in his estate tax return and the estate tax was paid thereon (R. 66).

The Commissioner determined that there should have been included in the decedent's income tax return for the period from January 1 to the date of his death on December 16,

1933, not only his share of the partnership earnings for the full 12-month fiscal year of the partnership ended July 31, but also his share of all the partnership earnings for the period from August 1 to the date of the decedent's death.

The Board refused to sustain the Commissioner's determination, following instead the uniform rulings of the Commissioner and the Board's own decisions supporting the taxpayer's position. The Commissioner acquiesced in the Board's decision as to two items, namely, interest on decedent's credit balance and capital for the period from August 1 to December 16, 1933, and the decedent's share of certain commissions earned during that period, but not collected by the partnership until some time in 1934. The Commissioner obtained a review, however, of the Board's decision with respect to the decedent's share of the partnership earnings actually collected by it during the period August 1 to December 16, 1933, amounting to $49,599.72. On this item the Circuit Court of Appeals for the Second Circuit reversed the Board.

The Question Presented.

The question is whether the decedent's income for the prior-to-death period, January 1 to December 16, 1933, should include not only his share of partnership earnings for the full 12-month fiscal year of the partnership ended July 31, 1933, but also his share of partnership earnings subsequent to the close of the regular partnership fiscal year, where the decedent reported his income on the cash receipts and disbursements basis and no part of such earnings ~~were~~ WAS received by or available to him or his representatives during the calendar year 1933.

Reasons for Granting the Writ.

1. The Court below has decided an important question of Federal law which has not been, but should be settled by this Court.

The decision of the Court below is the first, in any court of which we are aware, holding that there may be subjected to tax in one calendar year more than a year's current income. Despite the basic tenet of the income tax law that income taxes are assessed upon the basis of a 12-month period (See *Helvering* v. *Morgan's Inc.*, 293 U. S. 127; *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359), the Court below held that the decedent's income for 1933 should include not only his share of the partnership earnings for the full 12-month fiscal year of the partnership ended July 31, 1933, but also the decedent's share of partnership earnings for the additional 4½ months' period, from August 1 to December 16, 1933. By including in the decedent's income for one taxable period his share of partnership earnings for a 16½-months' period, the Court below placed him in a 50% surtax bracket instead of the 29% bracket applicable had he lived. Likewise, under the decision of the Court below, the surviving partners are placed in higher surtax brackets.

The only explanation offered by the Court below for its departure from the accepted rule was as follows:

> "Yet that did not make his taxable year include his income for more than twelve months. It did, indeed, include his share of partnership income for more than a twelve-month period, but that is immaterial since the partnership is not the taxpayer."

This is curious if not meaningless. Since the partnership is not the taxpayer, its income is taxed directly to the partners as theirs. First the Court says the partnership income is not that of the partner and in the very next sentence says the partnership is not the taxpayer. The unusual hardship here results *because* the partnership is not the taxpayer and the income is treated as that of the partners. This is a significant and material principle of the tax law so far as the taxation of partnership income is concerned, and not "immaterial" as the Court below stated. Confusion may result in the administration of the tax law from the Court's assertion that the income of the partnership is not that of the partners.

In an attempted justification of the inequitable result it reached, the Court below relied upon its earlier decision in *Darcy* v. *Commissioner,* 66 F. (2d) 581 (1933), and the decision of this Court in *Bull* v. *United States,* 295 U. S. 247 (1935). The *Darcy* case is not in point, for in that case neither the decedent partner nor the surviving partners were required to include in their returns for one taxable period their income from the partnership for a period of more than a year. The Court below also misinterpreted the decision of this Court in the *Bull* case. There, the partner and the partnership had the same accounting periods and there was no question involved of a decedent partner and the surviving partners being required to include in their returns for one taxable period their income from the partnership for a period of more than 12 months.

The decision of the Court below, unless reversed, gives the Commissioner authority to include in a partner's income for one year as much as 23 months' income from a partnership. Thus, if a partnership has a fiscal year ended January 31 and a partner dies on December 31, under the ruling of the Court below, the decedent and surviving partners must include in their returns for one calendar year not only the income of the partnership for the 12-month period ended January 31, but the 11-months' income from February 1 to December 31. With normal and surtax rates which increase according to the amount of income, the effect of such a rule upon partners may be extremely harsh if not disastrous. There is neither reason nor precedent for thus singling out the partnership form of doing business, used extensively by lawyers, business men and others, and subjecting it to such unusual treatment.

2. The Court below has decided an important Federal question in a way that is in conflict with the applicable decisions of this Court.

Section 182 (a) of the Revenue Act of 1932 and similar provisions of both the earlier and later acts, provide that

where, as in the instant case, a partner and the partnership have different "taxable years", the amount of income includible in the return of the individual partner "shall be based upon the income of the partnership for any taxable year of the partnership ending within his taxable year." One "taxable year" of the partnership ended within the period from January 1 to December 16, 1933, namely, the fiscal year of the partnership ended July 31, 1933. The Court below held that the death of the decedent dissolved the partnership and *ipso facto* brought to a close a second "taxable year" of the partnership within the meaning of Section 182 (a), and that an additional 4½ months' partnership income should be included in the decedent's return.

The decision of the Court below that dissolution terminates the taxable year of a partnership, is directly contrary to the decision of this Court in *Helvering* v. *Morgan's Inc., supra,* in which it was held that the "taxable year" of a corporation was not terminated through a change of status by affiliation with another corporation, even though a separate income tax return was filed for the period prior to affiliation and a consolidated income tax return for the period of affiliation.

Moreover, the Circuit Court's construction of Section 182 (a) is without precedent or authority. Two earlier decisions of the Board of Tax Appeals, directly in point, were to the contrary. *Archbald* v. *Commissioner,* 4 B. T. A. 483 (1926); *DeRoy* v. *Commissioner,* 19 B. T. A. 452 (1930). The Commissioner publicly acquiesced in the *Archbald* and *DeRoy* decisions, Cumulative Bulletin VI-1, p. 1; Cumulative Bulletin IX-2, p. 16. The ruling of the *Archbald* and *DeRoy* cases was accepted as the official position of the Treasury Department in *General Counsel's Memorandum* 2308, Cumulative Bulletin VI-2, p. 229 (1927), still unrevoked. The *Archbald* and *DeRoy* cases are supported by *Tooke* v. *Commissioner,* 17 B. T. A. 690 (1929) and *Reynolds* v. *Commissioner,* 17 B. T. A. 693 (1929) (acquiesced in by the Commissioner Cumulative Bulletin IX-1, pp. 46, 51),

where the Board held that the dissolution of a partnership does not terminate its accounting period. The decision of the Court below was the first to disturb the hitherto settled rule in cases of this character. No change in the applicable statutory provisions occurred to warrant the lower Court's decision.

Following this interpretation of Section 182 (a) in the *Archbald* case, and in *General Counsel's Memorandum* 2308, Congress re-enacted the Section without amendment in the succeeding Revenue Acts. Under the well settled rule of construction of this Court, such re-enactment of the statute without change constituted implied legislative recognition and approval of the administrative and judicial construction. *Heald* v. *District of Columbia,* 254 U. S. 20; *Helvering* v. *Bliss,* 293 U. S. 144. The Court below completely ignored this rule of construction.

The decision of the Court below conflicts with its own prior decision in *Bankers Trust Co.* v. *Bowers,* 295 Fed. 89, where it held that a change of status, or even the death of an individual does not terminate his accounting period. The decision of the Court below is also irreconcilable with numerous decisions of the Board of Tax Appeals to the effect that the dissolution of a corporation does not terminate its "taxable year". See *Mrs. Grant Smith* v. *Commissioner,* 26 B. T. A. 1178; *Palomas Land and Cattle Co.* v. *Commissioner,* 33 B. T. A. 999; *General Counsel's Memorandum* 2080, Cumulative Bulletin VI-2, p. 288.

The New York Partnership Law is identical with the Uniform Partnership Act now in force in many states. It provides that dissolution of a partnership is merely the change in relation of the partners caused by one ceasing to be associated in the carrying on "as distinguished from the winding up of the business" (Section 60, New York Partnership Law; Laws of 1919, Chapter 408; 7 U. L. A. 43). The New York Law further provides that a partnership is "not terminated by dissolution" but continues "until the winding up of partnership affairs is completed" (Section 61, New York Part-

nership Law; Laws of 1919, Chapter 408). Necessarily, the termination of the taxable year of a partnership prior to the time fixed therefor, is consistent only with the complete "termination" of the partnership itself, for until such termination the partnership may sue and be sued and it may realize income and sustain losses. In the interest of certainty, the Commissioners who drew the Uniform Partnership Act made a distinction between "dissolution" and "termination" of a partnership. The decision of the Court below ignores this distinction and fails to give heed to the purpose of the framers of the Uniform Partnership Act.

The effect of dissolution upon the taxable year of a partnership is a matter of far-reaching importance to all business conducted under the partnership form. Unexpected and unusual tax burdens may fall upon such enterprises if the rule of the Court below stands, whereas, the same results would not follow in the case of the death of an individual or dissolution of a corporation. Whether this discrimination against the partnership form of business is permissible, is a question which should be reviewed by this Court.

WHEREFORE, your Petitioner prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court on a day to be determined, a full and complete transcript of all the proceedings of such Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed; and that the Petitioner be granted such other and further relief as may seem proper.

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August 10, 1937.

BRIEF IN SUPPORT OF THE PETITION.

Opinions Below.

The opinion of the Board of Tax Appeals is reported at 34 B. T. A. 384 (R. 62). The opinion of the Circuit Court of Appeals was rendered on May 3, 1937, and is reported at 89 F. (2d) 692.

Jurisdiction.

The final judgment of the Circuit Court of Appeals, now sought to be reviewed, was entered on May 10, 1937. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. Code Title 28, Section 347).

Statement of the Case.

The principal facts are set forth in the petition *supra*, pages 2 to 4.

Specification of Errors.

1. The Circuit Court of Appeals erred in holding that the amount of $49,599.72, representing the decedent's distributive share of the profits of the partnership earned and collected by the partnership during the period August 1 to December 16, 1933, was taxable to the decedent in his 1933 return.

2. The Circuit Court of Appeals erred in failing to hold that only the decedent's distributive share of the profits of the partnership for the full 12-month fiscal year of the partnership ended July 31, 1933, constituted income taxable to the decedent for 1933.

3. The Circuit Court of Appeals erred in holding that the death of the decedent terminated the "taxable year" of the partnership.

The Statutes Involved.

The statutes involved will be found in the appendix, *infra*, pages 19 to 20.

ARGUMENT.

POINT I.

The decedent's death did not terminate a second taxable year of the partnership within the period covered by the decedent's 1933 return.

The Court below held that the decedent's death *ipso facto* terminated a second "taxable year" of the partnership within the period covered by the 1933 return of the decedent, and, consequently, under Section 182 (a), that the decedent's income for the period from January 1 to December 16, 1933, should include not only his share of the partnership income for the 12-month fiscal year of the partnership ended on July 31 of that year, but also the decedent's share of the partnership income for the period August 1 to December 16, 1933. The Board of Tax Appeals held to the contrary.

There was no provision in the partnership agreement that the death of a partner should terminate the accounting period constituting its "taxable year" (R. 38-45). Article Third of the partnership agreement provided as follows (R. 39):

> "The co-partnership hereunder shall commence as of August 1, 1933, and shall continue until July 31, 1934 (hereinafter sometimes called 'the fiscal year'), and shall be deemed to have been continued and extended from

> year to year thereafter, unless any one of the parties hereto shall give notice in writing, not less than thirty days prior to July 31st of any year, of intention to terminate this contract of partnership upon July 31st of such year, provided, however, the parties may dissolve said partnership by mutual consent at any time."

Article Sixth of the agreement provided that at the end of each fiscal year "during the continuance of this co-partnership" a general account should be taken for the purpose of ascertaining the net gains for the preceding year, and that such net gains should be distributed in proportion to the interest of each partner (R. 41). Article Ninth of the agreement provided (R. 44) that in the event of dissolution of the partnership in any manner the assets should be applied to the payment of debts, to the return of the capital, and then to the distribution of the profits.

Following the decedent's death on December 16, 1933, the business of the partnership was continued by the surviving partners, and actual liquidation under the provisions of Article Ninth did not occur until some time during 1934 (R. 21, 23). The Board's findings clearly show that the business of the partnership was not wound up on December 16, 1933, nor at any time during the calendar year 1933, for the business of the partnership was continued under the same name by the surviving partners (R. 21); it was not until January 30, 1934, that the audit of the affairs of the partnership for the period August 1 to December 16, 1933, was concluded (R. 21); liquidation of the partnership was not commenced until some time early in 1934 (R. 23); and the winding up of the affairs of the partnership was not completed before February 5, 1934, when the executors of the decedent's estate received the last payment on account of the decedent partner's interest in the firm (R. 23).

The controlling provisions of the New York Partnership Law support the conclusion that the death of the decedent did not terminate the "taxable year" of the partnership. Sections 60 and 61 provide as follows (Laws of 1919, Chapter 408):

"§60. Dissolution defined. The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.

§61. Partnership not terminated by dissolution. On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed."

Section 62 sets out the causes of dissolution of a partnership and provides in part that—

"Dissolution is caused:

* * * (4). By the death of any partner;"

The distinction in the New York Law between "dissolution" and "termination" of a partnership is derived from the Uniform Partnership Act (See Sections 29, 30, 7 U. L. A. 43). Commenting upon this distinction, the framers of the Uniform Partnership Act stated (7 U. L. A. 43):

"It is also frequently said that dissolution, although the word is used to designate only the termination of ordinary business relations, terminates the partnership, it being at the same time explained that the partnership thereafter continues to exist for the purpose of suing and being sued in the process of winding up partnership affairs. Certainty demands that this confusion should be removed if possible. *In this act dissolution designates the point in time when the partners cease to carry on the business together;* termination is the point in time when all the partnership affairs are wound up, winding up, the process of settling partnership affairs after dissolution." (Italics supplied).

The decisions under the Uniform Partnership Act clearly establish that the partnership as such continues to exist after dissolution for the purpose of collecting its debts, paying its liabilities, distributing its assets, and performing its antecedent engagements. It can sue and be sued as a part-

nership. Its contractual obligations continue and the surviving partners may bind the estate of the deceased partner in connection with the winding up of the business. *Kennedy* v. *Porter,* 109 N. Y. 526, 17 N. E. 426; *Bayer* v. *Bayer,* 215 App. Div. 454, 214 N. Y. Supp. 322; *Bell* v. *Porter,* 261 Mich. 97, 246 N. W. 93; *Cohen* v. *Swartz,* (1932) 104 Pa. Super. Ct. 414, 159 A. 54; *Shapira* v. *Budish,* (1931) 275 Mass. 120, 175 N. E. 159; *Stewart* v. *Angle,* (1934) 315 Pa. 135, 172 A. 898; *In re Heller's Estate,* (1935) 319 Pa. 135, 178 A. 681.

While the Court below purported to recognize a difference between "dissolution" and "termination" of the partnership, it said:

> "As a continuing source of income to the decedent, it [the partnership] ceased to exist when he died."

As a matter of fact, this was not so for the decedent actually realized income from contracts entered into before his death which were not liquidated until after he died (R. 65, 81). The confusion of the Court below is even more apparent, however, when we consider that affiliation with another corporation does not terminate the taxable year of a corporation, *Helvering* v. *Morgan's Inc.,* 293 U. S. 127; even after dissolution of a corporation its taxable year continues, *Smith* v. *Commissioner, supra,* and in the case of the death of an individual his accounting period is not terminated and the tax is computed as if the return were for a period of 12 months. *Bankers Trust Co.* v. *Bowers, supra.* There is no more reason for requiring the termination of the taxable year of a partnership upon its dissolution than there is in the case of the dissolution of a corporation, for in both cases, after liquidation, the only business carried on is in connection with liquidation. The Court below did not explain this strange inconsistency in its opinion.

In substance, the Court below refused to give effect to the provisions of the New York Law or to the Uniform Partnership Act making a real distinction between "dissolution"

and "termination" of a partnership. By holding that the partnership "ceased to exist" and holding that its taxable year terminated, the Court attributed to *dissolution* of the partnership the same effect as a complete *termination* and winding up of the partnership affairs.

It is clear from the New York statute that the partnership itself was not terminated by the dissolution caused by the death of the decedent, but continued in existence for the purpose of liquidation, which did not occur until 1934. Since the decedent's death did not result in the termination of the partnership itself prior to actual liquidation, why then should it result in the termination of the partnership's "taxable year" prior to actual liquidation? After dissolution and prior to liquidation, items of income may be collected, as they were in the present case*, debts may be paid and losses sustained, all relating to the business prior to dissolution. Such post-dissolution items relating to business prior to dissolution must certainly be taken into account before there can be any accounting to the decedent's estate or among the surviving partners.

Moreover, the decision of the Court below violates the basic tenet of the income tax law that income taxes are assessed on the basis of a 12-month period, for under its decision the decedent and the surviving partners are required to include in their returns for one taxable period their income from the partnership for a period of 16½ months, thus forcing them into the higher surtax brackets. From the very beginning the income tax laws have provided for the assessment of taxes upon the basis of a 12-month period. *Helvering* v. *Morgan's Inc.*, 293 U. S. 127; *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359. So inherent in the law is the principle

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* Thus certain commissions were earned by the partnership between August 1 and December 16, 1933, but were not collected until the contracts were liquidated after the death of the decedent (R. 65). These commissions grew out of business undertaken prior to dissolution of the firm on December 16, 1933, yet the Commissioner has not protested the exclusion of the decedent's share of such commissions from his 1933 income (R. 81).

of a 12-month period for computing income that the statute and regulations require the Commissioner's consent to changes in accounting periods which would result in returns being filed for more or less than the 12-month period (See Section 46 of the Revenue Act of 1932, *infra*, p. 20). It is no answer in the instant case, as asserted by the Circuit Court, to say that its decision does not subject the decedent and the surviving partners to tax in one period upon *their* income for more than a 12-month period, since the partnership is not the taxpayer. The partnership was not a separate taxable entity; for tax purposes the income of the partnership was the income of the individual partners. *Bull* v. *United States*, 295 U. S. 247, 254.

POINT II.

The consistent judicial and administrative construction of Section 182(a) has received the implied approval of Congress.

As early as 1926 the identical question here involved was considered and decided directly contrary to the decision of the Court below. *Archbald* v. *Commissioner*, 4 B. T. A. 483 This decision was acquiesced in by the Commissioner in 1927 (Cum. Bulletin VI-1, p. 1), and followed by his General Counsel in the same year. (*General Counsel's Memorandum*, 2308, Cum. Bulletin VI-2, p. 229). In 1930 the Board followed its decision in the *Archbald* case in *DeRoy* v. *Commissioner*, 19 B. T. A. 452 and again the Commissioner acquiesced (Cum. Bulletin IX-2, p. 2). Similarly in *Tooke* v. *Commissioner*, 17 B. T. A. 690 (1929), and in *Reynolds* v. *Commissioner*, 17 B. T. A. 693 (1929), both acquiesced in by the Commissioner Cumulative Bulletin IX-1, pp. 46, 51, it was held that the dissolution of a partnership does not terminate its accounting period.

Following this construction of Section 182 (a) in the *Archbald* case, and in *General Counsel's Memorandum* 2308, Congress, in the subsequent Revenue Acts, re-enacted the Section without amendment. It is an established principle that the repeated re-enactment by Congress of a statute after uniform administrative and judicial construction constitutes implied legislative recognition and approval of such administrative and judicial construction. Thus in *Heald* v. *District of Columbia,* 254 U. S. 20, this Court stated that it is the "settled rule" that:

> "* * * where provisions of a statute had previous to their re-enactment a settled significance, that meaning will continue to attach to them in the absence of plain implication to the contrary."

To the same effect, see *Helvering* v. *Bliss,* 293 U. S. 144, 151; *Old Mission Portland Cement Co.* v. *Helvering,* 293 U. S. 289. The decision of the Court below was a clear violation of this "settled rule" of statutory construction.

CONCLUSION.

This case is pecularly appropriate to the granting of a writ of certiorari. For the first time, a Court has subjected an individual to a tax upon more than a year's income, although the keystone of the tax structure is a 12-month tax-computing period. The question is of wide importance to all business conducted under the partnership form. The decision of the Circuit Court is in conflict with decisions of this Court and with the consistent judicial and administrative construction of the statute which received the implied approval of Congress by subsequent enactment of the applicable statutory provisions without change. The decision conflicts with the New York Partnership Law and the Uniform Part-

nership Act. It creates uncertainty among individuals, partnerships and corporations as to what is the "taxable year", the premature termination of which may result in additional tax burdens. This uncertainty can be dispelled only by a decision of this Court.

WHEREFORE, it is respectfully prayed that a writ of certiorari should issue.

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August 10, 1937.

APPENDIX.

The Statutes Involved.

Section 182 (a) of the Revenue Act of 1932 (47 Stat. 169, 222) provides as follows:

> "There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year. If the taxable year of a partner is different from that of the partnership, the amount so included shall be based upon the income of the partnership for any taxable year of the partnership ending within his taxable year."

Section 48 of the Revenue Act of 1932 (47 Stat. 169, 187) provides as follows:

> "When used in this title—
>
> (a) TAXABLE YEAR.—'Taxable year' means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under this Part. 'Taxable year' includes, in the case of a return made for a fractional part of a year under the provisions of this title or under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made. The first taxable year, to be called the taxable year 1932, shall be the calendar year 1932 or any fiscal year ending during the calendar year 1932."

Section 189 of the Revenue Act of 1932 (47 Stat. 169, 223) provides as follows:

> "Every partnership shall make a return for each taxable year, stating specifically the items of its gross income and the deductions allowed by this title, and shall include in the return the names and addresses of the individuals who would be entitled to share in the net in-

come if distributed and the amount of the distributive share of each individual. The return shall be sworn to by any one of the partners."

Section 41 of the Revenue Act of 1932 (47 Stat. 169, 185) provides as follows:

"The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year."

Section 42 of the Revenue Act of 1932 (47 Stat. 169, 185) provides as follows:

"The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period."

Section 46 of the Revenue Act of 1932 (47 Stat. 169, 186) provides as follows:

"If a taxpayer changes his accounting period from fiscal year to calendar year, from calendar year to fiscal year, or from one fiscal year to another, the net income shall, with the approval of the Commissioner, be computed on the basis of such new accounting period, subject to the provisions of section 47."